Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-100-93
LAMIN PCA, EDGAR JOSEPH JR FCJ AND NH CHAN JCA
24 MAY 1997

Companies and Corporations *— Charges — Sale by debenture of land charged under the National Land Code 1965 — Debenture registered under s 108 of the Companies Act 1965 conferred chargee with power of sale of land without the necessity of obtaining judicial sale — Whether s 108 of the Companies Act 1965 is an independent source for creation of an interest in land — National Land Code 1965 ss 206(3) & 254–265 — Companies Act 1965 s 108*

Companies and Corporations *— Debenture — Sale by debenture of land charged under the National Land Code 1965 — Debenture registered under s 108 of the Companies Act 1965 conferred chargee with power of sale of land without the necessity of obtaining judicial sale — Whether s 108 of the Companies Act 1965 is an independent source for creation of an interest in land — National Land Code 1965 ss 206(3) & 254–265 — Companies Act 1965 s 108*

Land Law *— Charge — Rights of chargee — Sale by debenture of land charged under the National Land Code 1965 — Whether such sale is permissible — Whether charge takes effect as a security only enforceable by proceedings in court to obtain judicial sale — Whether rights of chargor under the National Land Code 1965 can be waived or contracted out — National Land Code 1965 ss 206(3) & 254–265 — Companies Act 1965 s 108*

The borrower company ('the appellant') was the registered proprietor of certain lands ('the lands'). The appellant executed two legal charges ('the charges') under the National Land Code 1965 ('the NLC') over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') to secure banking facilities granted to the appellant. The charges were duly registered under s 108 of the Companies Act 1965 ('the Act'). Subsequently, the appellant executed a deed of debenture in favour of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture was duly registered pursuant to s 108 of the Act. The debenture provided, inter alia, for the bank to appoint receivers and managers and for such receivers and managers to have certain powers. Subsequently, events occurred upon which the powers to appoint receivers and managers under the debenture became exercisable. On 13 August 1987, pursuant to such powers, the bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant ('receivers and managers').

Since there was no express provision in the debenture appointing them attorneys of the appellant and being desirous of selling the lands without resorting to proceedings under the NLC to obtain a judicial sale, the receivers and managers applied to the High Court by way of originating summons for leave to sell the lands ('the

application'). On 27 February 1989, the appellant went into liquidation and the application by the receivers and managers was opposed by the liquidator ('the liquidator'). A

In the court below (see [1993] 2 MLJ 126), the learned judge held that: (i) the receivers and managers were entitled to sell the lands which were subject to the charges, without taking proceedings under the NLC to obtain a judicial sale; and (ii) the fact that a company has been put into liquidation does not affect the securities held by the receivers and managers; at least not until the secured creditors had been fully paid off. The secured creditors could therefore dispose of the securities despite the liquidation. The trial judge further said that receivers and managers were entitled to what the debenture provided for. The liquidator, being dissatisfied with the judgment of the court below appealed. B C

Counsel for the first respondent relied on s 206(3) of the NLC which provides that the provisions of the NLC requiring a dealing to be effected in the statutorily prescribed manner shall not affect the contractual operation of any transaction relating to alienated land or any interest therein. The question for determination was whether the learned judge was right in holding as he did. D

Held, allowing the appeal: E

(1) Under common law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or equitable estate vested in him in his role as mortgagee; whereas in the statutory charge under the NLC, the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the NLC with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale (see p 817I). F

(2) The relevant provisions of the NLC, to wit, ss 254–265 of the NLC conferring the rights upon chargors aforsesaid are designed for their protection. In the case of land held under Land Office title, the form of title corresponding to Land Office title or subsidiary title, the chargee makes his application for order for sale to the Land Administrator, in accordance with the procedure laid down in s 260 et seq of the NLC and these are also designed for the protection of the chargor. However, in considering such an application, the powers of the Land Administrator are limited. Thus, any objection as to the validity of the charge must be taken before the courts for it is no defence in the inquiry before the Land Administrator (see p 820B–D). G H

(3) Not every transaction in alienated land entered into by a person or bodies referred to in s 43 of the NLC confers rights in rem but only such dealings which fall within the meaning and ambit of the definition of 'dealing' in s 5 of the NLC. It follows therefore I

that s 108 of the Act is not an independent source for the creation of an interest in land. Sale by debenture of land charged under the NLC is nowhere provided for by statute. Section 108 of the Act appears to have been enacted without regard to the differences between the English law of mortgages and the statutory charge under the NLC (see p 820D–G).

(4) The provisions of the NLC as to the rights of chargors are designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as owner (see p 823A–C); *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 overruled.

(5) Section 206(3) of the NLC contains an express provision which states that the provisions of the NLC requiring a dealing to be effected in the statutorily prescribed manner shall not '... affect the contractual operation of any transaction relating to alienated land or any interest therein'. This provides statutory authority for the liberal application of equity whenever there is a basis for that.

It is, however, a condition precedent for the application of s 206(3) that there is in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract. When the relevant provisions of the debenture relied upon by the first respondent as conferring upon it a power to sell the lands were void, the condition precedent for the application of s 206(3) was absent (see pp 823I and 824A–C).

(6) The provisions of the NLC setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are *exhaustive and exclusive* and any attempt at contracting out of those rights — unless expressly provided for in the Code — would be void as being contrary to public policy.

Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the NLC to obtain a judicial sale (see p 824D–F).

(7) Since a charge takes effect as a security only, enforceable by proceedings in court to obtain a judicial sale, it follows that with the advent of liquidation, any sale by the receivers and managers of the lands pursuant to the debenture would be a purported sale

of property which belonged to the borrower company and the appellant would require the approval of the court under s 223 of the Act (see p 826D–E); *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616 distinguished and *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 overruled.

(8) Because a receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument is an officer of the corporation — and all officers of a corporation, whether past or present, are obliged to deliver up to the liquidator appointed by the court or as he directs: (i) all moveable and immovable property of the corporation in his custody or under his control; or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same — the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, since there is no estate for the receiver and manager to administer (see pp 826I and 827A–C); *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 overruled.

(9) The only persons who may be made respondents in misfeasance proceedings under s 305 of the Act are promoters, liquidators and officers. 'Officer' includes 'a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument', ie to say a privately-appointed receiver and manager, but does not include, inter alia: (i) any receiver who is not also a manager; and (ii) any receiver and manager appointed by the court or creditors. Orders may thus be made under s 305 of the Act against a privately-appointed receiver and manager (see p 827D–E); *B Johnson & Co (Builders) Ltd, Re* (1955) 1 Ch 634 distinguished.

Obiter:

The prayer in the application by the receivers and managers 'for leave to sell the lands' was not appropriate since if they were correct in their contention that the debenture did confer authority on them to sell the charged lands and to give a valid and registrable title to a purchaser, no leave would have been required. If, on the other hand, the debenture did not confer upon them the requisite authority to sell the lands, no leave could be given. It was because the receivers and managers had entertained some doubt about their authority under the debenture to sell the lands that the appropriate prayer for them to have inserted would have been for a declaration as to entitlement to sell the lands without resorting to proceedings under the NLC to obtain a judicial sale, and to give valid and registrable title to the purchaser (see pp 815H–I and 816A).

A **[Bahasa Malaysia summary**

Peminjam, sebuah syarikat ('perayu') adalah tuan punya berdaftar tanah-tanah tertentu ('tanah tersebut'). Perayu melaksanakan dua gadaian ('gadaian tersebut') di bawah Kanun Tanah Negara 1965 ('KTN') atas tanah tersebut memihak kepada Bank Bumiputra (M) B Bhd ('penentang') bagi menjamin kemudahan kewangan yang diberikan kepada perayu. Gadaian tersebut didaftarkan di bawah s 108 Akta Syarikat 1965 ('Akta tersebut'). Ekoran itu, perayu melaksanakan satu suratikatan debentur memihak kepada penentang pertama bagi menjamin pelbagai kemudahan kewangan ('debentur tersebut') yang mana perayu mewujudkan kedua-dua gadaian tetap C dan gadaian terapung. Debentur tersebut didaftarkan menurut s 108 Akta tersebut. Debentur tersebut memperuntukkan, antara lain, agar penentang melantik penerima dan pengurus dan supaya mereka mempunyai kuasa tertentu. Kemudiannya, peristiwa telah berlaku yang mana kuasa untuk melantik penerima dan pengurus di bawah D debentur boleh dilaksanakan. Pada 13 Ogos 1987, menurut kuasa-kuasa demikian, penentang telah melantik penentang kedua, ketiga dan keempat sebagai penerima dan pengurus perayu ('penerima dan pengurus').

Oleh kerana tiada peruntukan nyata dalam debentur tersebut yang melantik mereka sebagai wakil-wakil perayu dan mereka ingin E menjual tanah tersebut tanpa perlu menggunakan prosiding KTN bagi memperolehi jualan kehakiman, penerima dan pengurus memohon kepada Mahkamah Tinggi melalui saman pemula untuk kebenaran menjual tanah tersebut ('permohonan tersebut'). Pada 27 Februari 1989, perayu mengalami penyelesaian dan permohonan F oleh penerima dan pengurus dibantah oleh penyelesai ('penyelesai tersebut').

Di mahkamah bawah (lihat [1993] 2 MLJ 126), hakim yang arif memutuskan bahawa: (i) penerima dan pengurus berhak menjual tanah tersebut yang tertakluk kepada gadaian tersebut, tanpa G mengambil prosiding di bawah KTN bagi memperolehi jualan kehakiman; dan (ii) fakta bahawa sesebuah syarikat telah diletakkan dalam penyelesaian tidak menjejaskan cagaran yang dipegang oleh penerima dan pengurus; sekurang-kurangnya tidak sehingga si piutang bercagar telah dibayar sepenuhnya. Oleh itu, si piutang bercagar boleh melupuskan cagaran-cagaran walaupun tahu akan penyelesaian. H Hakim perbicaraan seterusnya mengatakan bahawa penerima dan pengurus berhak kepada apa yang diperuntukkan oleh debentur. Penyelesai tersebut, yang tidak berpuas hati dengan penghakiman mahkamah bawah, merayu.

Peguam penentang pertama bergantung kepada s 206(3) KTN I yang memperuntukkan bahawa peruntukan KTN yang menghendaki suatu urusniaga dilaksanakan dengan cara yang disyaratkan dalam statut tidak akan mempengaruhi operasi kontraktual mana-mana transaksi berkaitan dengan tanah berimilik atau apa-apa kepentingan

dalamnya. Soalan untuk penentuan adalah sama ada hakim yang arif adalah betul dalam memutuskan sebagaimana yang dibuatnya. A

Diputuskan, membenarkan rayuan:

(1) Di bawah gadai-janji common law, hak dan kuasa pemegang gadai-janji terdiri daripada yang berkaitan dengan estet sah atau ekuiti yang diletakhak dalamnya dalam peranan sebagai pemegang gadai-janji, manakala dalam gadaian statutori di bawah KTN, hak dan kuasa pemegang gadaian tidak berpunca daripada estet demikian oleh kerana tiada apa-apa yang diletakhak dalamnya dan oleh itu hak dan kuasanya mesti datang daripada peruntukan relevan KTN dan gadaian berkesan sebagai satu cagaran sahaja, yang boleh dikuatkusakan oleh prosiding dalam mahkamah bagi mendapatkan jualan kehakiman (lihat ms 817I). B C

(2) Peruntukan relevan KTN, iaitu ss 254–265 KTN yang mengurniakan hak ke atas penggadai tersebut dicipta untuk perlindungan mereka. Dalam kes tanah yang dipegang di bawah hakmilik Pejabat Tanah, bentuk hakmilik yang sejajar dengan hakmilik Pejabat Tanah atau hakmilik subsidiari, pemegang gadaian membuat permohonannya untuk perintah jualan kepada Pentadbir Tanah, menurut prosedur yang dinyatakan dalam s 260 et seq KTN dan ini juga direka untuk perlindungan penggadai. Walau bagaimanapun, dalam mempertimbangkan permohonan demikian, kuasa Pentadbir Tanah adalah terhad. Justeru itu, sebarang bantahan kepada kesahan gadaian mestilah diambil di mahkamah kerana ia bukanlah pembelaan dalam sesuatu siasatan di hadapan Pentadbir Tanah (lihat ms 820B–D). D E

(3) Bukanlah setiap transaksi dalam tanah berimilik yang diikat oleh seseorang atau badan yang dirujuk dalam s 43 KTN mengurniakan hak in rem tetapi hanya urusniaga yang dirangkumi oleh makna dan lingkungan tafsiran 'urusniaga' dalam s 5 KTN. Ini bermakna bahawa s 108 Akta tersebut tidak merupakan suatu sumber bebas untuk kewujudan kepentingan dalam tanah. Jualan menerusi debentur tanah yang digadaikan di bawah KTN tidak diperuntukkan di mana-mana oleh statut. Seksyen 108 Akta tersebut nampaknya telah digubalkan tanpa mengendahkan perbezaan di antara undang-undang gadai-janji Inggeris dan gadaian statutori di bawah KTN (lihat ms 820D–G). F G

(4) Peruntukan KTN berkenaan hak penggadai dicipta untuk perlindungan mereka dan tidak boleh diketepikan; penggadai sendiri juga tidak boleh mengikat kontrak luar daripada KTN. Oleh yang demikian, ini bermakna bahawa tiada kuasa jualan boleh dikurniakan oleh penggadai di bawah KTN pada pemegang gadaian sendiri melalui debentur atau surat kuasa wakil atau sebaliknya, tetapi prosiding mesti dibawa oleh pemegang gadaian bagi memperolehi jualan kehakiman menurut prosedur yang dinyatakan dalam KTN. Dalam keadaan sedemikian, sebarang kuasa jualan yang kononnya untuk dikurniakan atas pemegang H I

gadaian sendiri, tanpa menyebut notis dan jangkamasa keingkaran, melalui satu debentur atau surat kuasa wakil dan keperluan untuk memperolehi jualan kehakiman, akan menjadi tak sah dan tidak berkesan bagi membolehkan pembeli dianggap sebagai pemunya (lihat ms 823A–C); *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 ditolak.

(5) Seksyen 206(3) KTN mengandungi peruntukan nyata yang menyatakan bahawa peruntukan KTN yang menghendaki suatu urusniaga dilaksanakan dalam cara statutori yang disyaratkan tidak akan '... melibatkan operasi kontrak mana-mana transaksi yang berkaitan dengan tanah berimilik atau apa-apa kepentingan dalamnya'. Ini memperuntukkan autoriti statutori bagi pemakaian liberal ekuiti di mana terdapat asas untuknya.

Namun demikian, ia merupakan satu syarat terdahulu untuk pemakaian s 206(3) bahawa terdapat suatu transaksi berhubung dengan tanah berimilik atau kepentingan dalamnya yang sah dan boleh dikuatkuasakan sebagai satu kontrak. Apabila peruntukan relevan debentur tersebut yang penentang pertama bergantung kepada sebagai mengurniakannya kuasa untuk menjual tanah tersebut adalah terbatal, syarat terdahulu untuk pemakaian s 206(3) tidak didapati (lihat ms 823I dan 824A–C).

(6) Peruntukan KTN yang menyatakan hak dan remedi pihak-pihak di bawah gadaian statutori atas tanah dalam Bah XVI adalah *lengkap dan eksklusif* dan sebarang percubaan untuk mengikat kontrak luar daripada hak itu — melainkan diperuntukkan secara nyata dalam KTN — adalah tak sah dan melanggar polisi awam.

Oleh itu, penerima dan pengurus tidak berhak menjual tanah yang digadaikan dengan kuasa yang dikurniakan kepada mereka oleh debentur tersebut tanpa mengambil prosiding di bawah KTN bagi memperolehi suatu jualan kehakiman (lihat ms 824D–F).

(7) Oleh kerana satu gadaian dikuatkuasakan sebagai cagaran sahaja, yang boleh dikuatkuasakan oleh prosiding dalam mahkamah bagi mendapatkan jualan kehakiman, ini bermakna bahawa dengan kemunculan penyelesaian, sebarang jualan oleh penerima dan pengurus tanah tersebut menurut debentur tersebut akan menjadi jualan harta yang dimilik oleh syarikat peminjam dan perayu akan memerlukan kelulusan mahkamah di bawah s 223 Akta tersebut (lihat ms 826D–E); *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616 dibeza dan *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 ditolak.

(8) Oleh kerana penerima dan pengurus mana-mana bahagian akujanji perbadanan yang dilantik di bawah kuasa yang terkandung dalam mana-mana instrumen adalah seorang pegawai perbadanan — dan semua pegawai perbadanan, sama ada yang dahulu atau semasa, wajib menghantar-serah kepada penyelesai yang dilantik

oleh mahkamah atau yang diarahkannya: (i) kesemua harta alih dan harta tak alih perbadanan dalam jagaannya atau di bawah kawalannya; atau (ii) kesemua buku dan kertas kepunyaan perbadanan dalam jagaan atau kawalannya, yang dikehendaki menyerah yang sama di sisi undang-undang — implikasi yang jelas adalah bahawa penyelesaian tidak sekadar menamatkan agensi seorang penerima dan pengurus tetapi juga kuasanya pada penggulungan, oleh kerana tiada estet untuk ditadbirkan oleh penerima dan pengurus (lihat ms 826I dan 827A–C); *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor* [1986] 1 MLJ 75 ditolak.

(9) Orang yang boleh dijadikan penentang dalam prosiding misfeasans di bawah s 305 Akta tersebut hanya adalah penganjur, penyelesai dan pegawai. 'Pegawai' termasuk 'seorang penerima dan pengurus mana-mana bahagian akujanji perbadanan yang dilantik di bawah kuasa yang terkandung dalam mana-mana instrumen', iaitu seorang penerima dan pengurus yang dilantik secara persendirian, tetapi tidak termasuk, antara lain: (i) mana-mana penerima yang bukan juga seorang pengurus; dan (ii) mana-mana penerima dan pengurus yang dilantik oleh mahkamah atau si piutang. Justeru itu, perintah boleh dibuat di bawah s 305 Akta tersebut terhadap seorang penerima dan pengurus yang dilantik secara persendirian (lihat ms 827D–E); *B Johnson & Co (Builders) Ltd, Re* (1955) 1 Ch 634 dibeza.

Obiter:

Permintaan dalam permohonan oleh penerima dan pengurus 'untuk kebenaran menjual tanah tersebut' adalah tidak wajar oleh kerana jika mereka adalah betul dalam hujah bahawa debentur tersebut memang mengurniakan kuasa ke atas mereka untuk menjual tanah yang digadaikan dan untuk memberikan satu hakmilik yang sah dan boleh didaftarkan kepada pembeli, tiada kebenaran diperlukan. Sebaliknya, jika debentur tersebut tidak mengurniakan kuasa yang diperlukan untuk menjual tanah tersebut ke atas mereka, tiada kebenaran boleh diberikan. Oleh kerana penerima dan pengurus mempunyai keraguan tentang kuasa mereka di bawah debentur tersebut untuk menjual tanah tersebut, permintaan sesuai untuk dimasukkan adalah satu perisytiharan mengenai hak menjual tanah tanpa menggunakan prosiding KTN bagi memperolehi jualan kehakiman, dan untuk memberikan hakmilik sah dan boleh didaftarkan kepada pembeli (lihat ms 815H–I dan 816A).]

Notes

For cases on charges under company law, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 33–52.

For cases on debenture under company law, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 54–57.

A For cases on rights of chargee, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1547–1548.

Cases referred to

American Express International Banking Corp v Hurley [1985] 3 All ER 564 (refd)
B
B Johnson & Co (Builders) Ltd, Re (1955) 1 Ch 634 (distd)
British Eagle International Airlines Ltd v Compagnie Nationale Air France [1975] 1 WLR 758 (refd)
Burton, ex p Union Bank of Australia Ltd, Re (1901) 27 VLR 437 (refd)
Chartered Bank v Packiri Maideen & Anor [1963] MLJ 276 (refd)
C *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 (refd)
Chung Khiaw Bank Ltd v Lau Ah Yen & Anor [1989] 2 MLJ 247 (refd)
Gosling v Gaskell [1897] AC 575 (refd)
Gurpal Singh v Kananayer [1976] 2 MLJ 34 (refd)
D *Hj Taib v Ismail* [1971] 2 MLJ 36 (refd)
Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 (refd)
Johnson v Moreton [1978] 3 All ER 37 (refd)
Kuala Lumpur Finance Bhd v Yap Poh Kian (Teo Sik & Anor, Interveners) [1992] 1 MLJ 472 (refd)
E *Lee Kim Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141 (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)
Malaysia Credit Finance Bhd v Yap Hock Choon & Anor [1989] 1 MLJ 232 (refd)
F *Mercantile Bank Ltd v Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196 (refd)
Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Bhd & Anor [1996] 1 MLJ 374 (refd)
National Bank of Australasia v United Hand in Hand and Band of Hope Co (1879) 4 AC 391 (refd)
G *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222 (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)
Smith v National Trust (1912) 45 Can SCR 618 (refd)
Sowman v David Samuel Trusts Ltd [1978] 1 All ER 616 (distd)
Suppiah v Ponnampalam [1963] MLJ 202 (refd)
H *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 (refd)
United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (In liquidation) & Anor [1986] 1 MLJ 75 (overd)
Yong Tong Hong v Siew Soon Wah & Ors [1971] 2 MLJ 105 (refd)
I

Legislation referred to

Companies Act 1965 ss 4(1)(b), 108, 223, 300(1), (1)(b)(i), (ii), 305
National Land Code 1965 ss 5, 43, 206, 254, 255, 257, 258, 259, 266(1)

Powers of Attorney Ordinance 1949 ss 4, 6(1)
Companies Act 1948 ss 227, 333 [UK]
Land Transfer Act 1890 s 209 [Aus]

Appeal from: Originating Summons No D3-31-195-88 (High Court, Kuala Lumpur)

Cecil Abraham (*Rabindra S Nathan*, *Paul Ong* and *Kenny Ng* with him) (*Paul Ong & Associates*) for the appellant.

T Thomas (*Sitpah Selvaratnam* with him) (*Skrine & Co*) for the respondent.

Edgar Joseph Jr FCJ (delivering the judgment of the court): The Appellant ('the Borrower Company') is the registered proprietor of certain lands comprised in HS (D) 11017 PTD 12680 to HS (D) 11025 PTD 12688, HS (D) 11026 PTD 12690 to HS (D) 11323 PTD 12987, HS (D) 11324 PTD 12989 to HS (D) 11340 PTD 13005 in the Mukim Simpang Kanan in the district of Batu Pahat, Johor ('the lands').

In September 1980, the Borrower Company executed a first legal charge under the National Land Code 1965 ('the Code') over the lands in favour of Bank Bumiputra (M) Bhd, the first respondent ('the Bank') to secure banking facilities granted to the Borrower Company, bearing presentation No 17837/80 Vol 756 Folio 29 and registered on 18 September 1980 ('the First Statutory Charge').

Similarly, in June 1985, the Borrower Company executed a second legal charge under the Code over some of the lands — namely, HS (D) 11325 PTD 12990 to HS (D) 11340 PTD 13005 — in favour of the Bank to secure banking facilities granted to the Borrower Company, bearing presentation No 6658/85 Vol 1376 Folio 82 and registered on 30 June 1985 ('the Second Statutory Charge').

The First and the Second Statutory Charges were duly registered under s 108 of the Companies Act 1965 ('the Act').

On 29 June 1985, the Borrower Company executed a deed of debenture in favour of the Bank to secure various banking facilities ('the Debenture') whereby the Borrower Company created:

(1) a fixed charge over all its plant, equipment, machinery, motor vehicles with its accessories and parts pertaining thereto; and

(2) a first floating charge over, inter alia, all its undertakings, properties and assets both moveable and immovable.

The provisions of the Debenture, so far as relevant to this appeal, were these:

(i) at any time after the money thereby secured shall have become repayable:

(a) the Bank or any authorized person may enter into and upon any land or premises where the properties or assets of the company thereby charged are and may take possession and control thereof (s 8.03); and

(b) the Bank may appoint any persons to be the Receivers and Managers of the properties thereby charged to it (s 8.03(c)).

(ii) the Receivers and Managers appointed by the Bank shall have power, inter alia:

(a) to take possession of or collect and get in all the properties or assets charged under the Debenture;

(b) to carry on, manage or concur in carrying on or managing the company's business;

(c) to sell or concur in selling any of the assets or properties of the company thereby charged at such price as they in their absolute discretion shall think fit, having regard to the views and desires of the Bank; and

(d) to do all such other reasonable acts and things as may be considered to be incidental or conducive to any of the matters or powers contained in the debenture and which the Receivers and Managers may lawfully do as agents of the company (s 8.04);

(iii) the Bank may at any time after the money thereby secured shall have become payable effect the sale of any of the properties of which it takes possession and the company shall do all things necessary to enable the Bank to complete any such sale (s 10.07).

The Debenture was duly registered pursuant to s 108 of the Act.

Events having occurred upon which the powers to appoint receivers and managers under the Debenture became exercisable, on 13 August 1987, the Bank — pursuant to such powers — duly appointed the Second, Third and Fourth Respondents as Receivers and Managers of the Borrower Company ('the Receivers and Managers').

In these circumstances, the Receivers and Managers — recognizing that there was no express provision in the Debenture appointing them as attorneys of the Borrower Company and being desirous of selling the lands without resorting to proceedings under the Code to obtain a judicial sale — chose to apply to the High Court by way of Originating Summons issued on 1 October 1988 'for leave to sell the lands'.

On 27 February 1989, the Borrower Company went into liquidation and the application by the Receivers and Managers was opposed by the liquidator ('the Liquidator').

At the outset, we should like to point out that the prayer in the application by the Receivers and Managers 'for leave to sell the lands' was not appropriate since if they were correct in their contention that the Debenture did confer authority on them to sell the charged lands and to give a valid and registrable title to a purchaser, no leave would have been required. If, on the other hand, the Debenture did not confer upon them the requisite authority to sell the lands, no leave could be given. It was because the Receivers and Managers had entertained some doubt about their authority under the Debenture to sell the lands that the appropriate prayer for them to have inserted would have been for a declaration as to

entitlement to sell the lands without resorting to proceedings under the Code to obtain a judicial sale, and to give valid and registrable title to the purchaser. A

Having said that, we must add that this point about the form of the prayer was not taken either in the court below or before us, and the appeal was argued on the basis of the appropriate prayers. In these circumstances, we consider that this appeal should be decided on the same basis and so we need say nothing more about this point. B

In the Court below, the learned judge held that: (i) by virtue of the powers conferred upon them by the Debenture, the Receivers and Managers were entitled to sell the lands which were subject to the First and Second Statutory Charges without taking proceedings under the Code to obtain a judicial sale; and (ii) the fact that a company has been put into liquidation does not affect the securities held by the receivers and managers; at least, not until the secured creditor has been fully paid off. The secured creditors could dispose of the securities despite the liquidation. He further said that the Receivers and Managers were entitled to do what the Debenture entitled them to do (see [1993] 2 MLJ 126). C D

In deciding as he did, the learned judge relied heavily on the judgment of the High Court at Johor Bahru in *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* [1986] 1 MLJ 75, where the facts bore a strong resemblance to the present case. In holding as it did, the High Court at Johor Bahru, after referring to the rival submissions of counsel, said this (at p 82): E

> The power to sell under the debenture arises by virtue of the contractual provisions of the debenture itself. In this case, cl 10 of the debenture is relevant. So is s 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienating land. F

And further down, the High Court at Johor Bahru said this:

> Here the bank has the issue document of title and all that is required to consummate the sale is a valid registrable transfer of the property. In the circumstances of this case, this objective can be easily achieved by making an order that the bank and/or the receiver be entitled to require the registrar of this court to execute on behalf of the company any transfer which the bank and/or the receiver may present, subject to the name of the transferee and the consideration for the sale being duly stated therein. A further order can, if need be, be made directing the Registrar of Titles to register the transfer in favour of the purchaser. In other words, the same procedure would be followed as if the sale had been conducted by the court. G H

And dealing with the impact of liquidation upon the powers of the receiver and manager there, the High Court at Johor Bahru said this (at p 81):

> Mr Ong's next submission is that upon the commencement of the liquidation (ie, the date of the presentation of the petition — see s 219(2) of the Act), the agency of the receiver for the company came to an end. But a clear distinction must be drawn between the termination of the agency and the survival of the powers of the debenture holder, which in my view of the law, transcend and exist independently of the liquidation. I

The Liquidator, being dissatisfied with the judgment of the Court below, had caused the present appeal to be brought.

A Broadly stated, the question for decision in the present appeal is whether the learned judge was right in holding as he did on *both* points of law hereinbefore mentioned.

Before us, the basic contention of Counsel for the Bank is that the special agreement contained in the Debenture conferred on the Bank a B conventional power of sale exercisable independently of the provisions of the relevant provisions of the Code. In considering this argument, it is necessary to examine the nature and characteristics of a charge under the Code, the rights and powers incidental to such a security and lastly, whether a study of the scheme of the relevant provisions of the Code shows that the legislature was dealing *exhaustively and exclusively* with the powers C of the statutory chargee to defeat the chargor's title as registered proprietor *or* more particularly, whether such a study reveals that the legislature intended that a chargor can — by the introduction of apt and sufficient words, whether in an annexure to the charge under the Code or a debenture — effectively confer upon his chargee a power of sale in additional to and D independent of the powers conferred by the relevant provisions of the Code, and exercisable without the intervention of the court, thus bypassing the machinery expressly provided by the Code in that behalf.

The essential *difference* between a Common Law mortgage and a statutory charge under the Code may be taken from Dass in his valuable work E on *The Torrens System in Malaya* at p 429 paras 2 and 3 where he says this:

> In an English mortgage, where ownership is transferred until the property mortgaged is sold by the mortgagee or foreclosed and the sale becomes absolute, the equity of redemption remains with the mortgagor. *Apropos* of English mortgage Lord MacNaghten remarked, 'No one I am sure, by the light of nature, ever understood an English mortgage of real estate' (*Samuel* F *v Jarrah Timber & Wood Paving Corp Ltd* [1904] AC 323 at p 326). 'By an indenture of mortgage, the legal estate is conveyed to the mortgagee subject to the condition that the mortgagee will reconvey upon payment of principal and interest secured by the deed. Though registration is usual and desirable for the protection of the mortgagee, it is not essential to the validity of the mortgage. Equity has, however, always regarded the mortgagee as taking G only such an estate as was necessary for the purpose of the security' (Beckenham and Harris, *The Real Property Act* (NSW), p 131).
>
> Under the Torrens system, there is no transfer of ownership of land by statutory mortgage. The distinction between the power of a statutory mortgagee in practically every Torrens legislation, including Singapore, (Land Titles Ordinance, ss 54 and 60; Baalman, *Singapore Torrens System*, H pp 133, 141) and of a statutory chargee in the Malay States is that in the latter jurisdiction, 'no power of sale or foreclosure is conferred on the chargee himself, but proceedings must be taken to obtain a judicial sale'.

To put it another way, under the Common Law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or I equitable estate vested in him in his role as mortgagee; *whereas* under the statutory charge *under the Code*, the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the Code with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale.

The next matter which calls for consideration was whether the scheme of the relevant provisions of the Code shows that the legislature was dealing *exhaustively and exclusively* with the powers of a statutory chargee to defeat the chargor's title as registered proprietor. This topic requires an examination of the rights and obligations of chargor and chargee incidental to a charge under the Code.

Clearly, in the event of proceedings being brought under the Code to enforce a statutory charge over land, a chargor possesses certain valuable rights — none of which is possessed by a borrower company under a debenture in common form. It is not proposed to set out an exhaustive list of these rights but some of the more obvious ones may be noted.

Firstly, upon a breach by the chargor of any of the agreements on his part expressed or implied in the charge continuing for at least a month or such alternative period as may be specified in the charge, notice in Form 16D is served specifying the breach and requiring the chargor to remedy the same within a month of the date of the notice or such alternative period as may be specified in the charge, with a warning that in the event of non-compliance, proceedings to enforce the charge by obtaining a judicial sale will be commenced (s 254(1) of the Code). Under this provision, there will generally be a time lag of at least two months between the date of breach and the commencement of proceedings in court to enforce the charge. In the case of charges where the principal is payable on demand, s 255(1) of the Code provides an alternative procedure by requiring service of a notice in Form 16E, immediately upon such breach, requiring it to be remedied within a month and adding that in the event of non-compliance, proceedings to enforce the charge by obtaining a judicial sale may be forthwith commenced without it being required to serve a notice in Form 16D under s 254(1). Under this provision, there will be a time lag of at least a month between the date of breach and the commencement of proceedings in court to enforce the charge.

It is obvious that the advantage of the Notice requirements under ss 254 and 255 of the Code is that it will entail delay, thus affording opportunity to the chargor to bustle about to raise the money to pay the demands. Non-compliance with the notice requirements will render a subsequent order for sale liable to be set aside as being void and of no effect (see, eg *Muniandy a/l Thamba Kaundan & Anor v Development & Commercial Bank Bhd & Anor* [1996] 1 MLJ 374).

Secondly, proceedings for sale directed by the Code require judicial intervention. Thus, the chargor will be accorded a certain measure of protection since the judge will have to be satisfied that the requirements of the Code have been satisfied before making an order for sale.

Thirdly, at the hearing of proceedings directed under the Code, the chargor will have the opportunity of 'showing cause to the contrary' within the meaning of s 254 of the Code; in other words, the right to be heard.

Moreover, as pointed out by Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 at p 311B:

> Under ss 258 and 261, the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the

deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale.

Fourthly, by reason of s 257 of the Code, the terms to be inserted in the order for sale must include a sale by public auction on an ascertained date not less than a month from the date of the order and at a reserve price fixed by the Registrar of the Court and the total sum payable under the charge at the date of the order. The conditions of sale are usually provided for in the relevant state conditions of sale.

Fifthly, the chargor has a right to be served with a copy of the Order for Sale, for the sale to be advertised and there is an obligation resting on the chargee to prepare the conditions of sale and to deliver to court the issue document of title (see s 258 of the Code).

Sixthly, the chargor has the advantage of the sale being effected under the direction of an officer of the court who may seek the assistance of a licensed auctioneer (see s 259 of the Code).

Seventhly, by virtue of s 266(1) of the Code, a chargor against whom an order for sale has been made has the right, at any time before the sale has been concluded — this is to say, before the fall of the hammer — to stop the sale by tendering the total sum due under the charge, including accrued interest and the usual expenses, to the Registrar of the court — or, as the case may be, to the Land Administrator — and thereupon, the order for sale shall cease to have effect. In such a situation, the chargor shall be entitled to a discharge of charge and return of the issue document of title.

This brings us to *Chartered Bank v Packiri Maideen & Anor* [1963] MLJ 276, wherein Gill J (as he then was) held that once a charge action for an order for sale has been commenced, the charged land had to be sold by public auction. This decision is open to some justifiable criticism: s 266(1) of the Code provides that a chargor against whom an order for sale has been made may, at any time before the conclusion of the sale, stop the sale by tendering the amounts specified in s 266(2) and thus be entitled to a discharge of charge and return of the issue document of title. If a chargor can, at such a late stage, be entitled to a discharge, as a matter of logic and speaking generally, there appears to be no reason why at an earlier stage, a chargor's application to sell the charged land by private treaty so as to enable him to exercise his right of discharge should be refused simply because proceedings for an order for sale have been commenced.

Eighthly, where a purchaser at the judicial sale does not complete the contract on the due date and seeks an extension of time to pay the balance of the purchase price, he must apply to court for such extension, in which event the chargor has a right to be heard and a denial thereof will render any registration of the sale procured thereby null and void as being ultra vires the powers of the Code (see *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (SC)).

Ninthly, a chargor has a right to an order setting aside a judicial sale of land subject to a statutory charge (even though at such a sale, the chargee is the vendor because the chargor abdicates his rights as the registered owner of the land in favour of the chargee) if he can establish that the sale had been conducted fraudulently, collusively or improperly to

the prejudice of the chargor (see *Kuala Lumpur Finance Bhd v Yap Poh Kian (Teo Sik & Anor, Interveners)* [1992] 1 MLJ 472). In that case, Lim Beng Choon J held that neither the Registrar nor the auctioneer had any interest in the sale, and that being so, the Registrar had no power to grant an extension of time for payment of the balance of the purchase price by the interveners/purchasers without the consent of the chargee.

It is obvious that the relevant portions of the Code — to wit, ss 254–265 — conferring the rights upon chargors aforesaid are designed for their protection. In the case of land held under a Land Office title, the form of title corresponding to Land Office title or subsidiary title, the chargee makes his application for order for sale to the Land Administrator in accordance with the procedure laid down in s 260 et seq of the Code and these are also designed for the protection of the chargor. However, in considering such an application, the powers of the Land Administrator are limited (see, eg, *Gurpal Singh v Kananayer* [1976] 2 MLJ 34 at p 36). Thus, any objection as to the validity of the charge must be taken before the courts for it is no defence in the inquiry before the Land Administrator (see *Suppiah v Ponnampalam* [1963] MLJ 202 at p 204).

It is equally obvious that it is not every transaction in alienated land entered into by a person or bodies referred to in s 43 of the Code which confers rights in rem but only such dealings as come within the meaning and ambit of s 5 of the Code which provides:

> 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order; ... .

It follows that s 108 of the Act is not an independent source for the creation of an interest in land. Sale by debenture of land charged under the Code is nowhere provided for by statute. Section 108 appears to have been enacted without regard to the difference between the English law of mortgages and the statutory charge under the Code.

The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:

> Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (*quilibet potest renunciare juri pro se introducto*), difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

A Turning to case law, on the subject of when *contracting out* of a statute may or may not be permitted, *Johnson v Moreton* [1978] 3 All ER 37, *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; *Ooi Boon Leong & Ors v Citibank NA* [1984] 1 MLJ 222; *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758; *Lee Kim* B *Seng v Acme Canning Sdn Bhd* [1977] 2 MLJ 141 and *Hj Taib v Ismail* [1971] 2 MLJ 36 may be read with profit.

But, most particularly, there are at least two Australian cases which show that a clause in a mortgage to deprive a mortgagor of his right to have a notice of demand served upon him after he is in default as a necessary C preliminary step to a sale under the relevant Victorian legislation would be invalid. I refer to *National Bank of Australasia v United Hand in Hand and Band of Hope Co* (1879) 4 AC 391 and *Re Burton, ex p Union Bank of Australia Ltd* (1901) 27 VLR 437.

In *National Bank of Australasia*'s case, the special clause in the instrument of mortgage was to the effect that notwithstanding anything D contained in the Land Transfer Act, it should be lawful for the bank, in the event of default being made in the payment of the principal money and interest secured immediately to serve notice of demand and, after the expiration of 14 days from the service of the notice of demand, to sell the lands in pursuance of the powers in that behalf vested in the mortgagee E under the 85th section of the statute.

The 84th section provided that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in F the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provided that if such default shall continue for a month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land.

It was argued that the demand served was the only notice of demand G required to be served to support a sale made 14 days after this service in pursuance of the statutory power. Their Lordships did not agree with this contention. They held that a demand within the meaning of the statute was necessary in order to fix the time of payment and until its service there could be no default. Their Lordships observed that the special clause in the instrument of mortgage qualified the 84th section by allowing notice of H demand to be served immediately instead of 'one month' after default, and the 85th section by allowing the sale to be made 14 days instead of a month after service of such notice was ineffective to deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary step to a sale under the statutory power. I Their Lordships concluded this part of the case by saying that in the circumstances outlined, upon an application to complete the title of the purchaser by registration under the 87th section of the Act, an objection on the ground of failure to serve a proper notice of demand would probably have been taken by the registrar.

In *Re Burton*, an instrument of mortgage registered under the provisions of the Land Transfer Act 1890 contained a covenant for payment on demand in writing given to or sent through the post in a prepaid letter addressed to the mortgagor, his heirs, executors, administrators or transferees. Subsequently, a transfer of the mortgage was registered. Default in payment occurred, and notice of sale under s 114 of that Act was served on the mortgagor by registered letter but no demand for payment and no notice under the section were served upon the transferee.

In refusing the application for foreclosure, the Commissioner of Titles said, inter alia, this:

> Section 115 of the Act deals with mortgages which make the money secured payable on demand, and as ss 84 and 85 of the Transfer of Land Statute 1866, No 301 (corresponding to ss 114 and 115 of the Land Transfer Act 1890) required default, demand, sale, and the mortgage required default, demand, sale, s 44 of Act 872 (now by consolidation s 115 of the Land Transfer Act 1890) was passed to make the one notice and the one default sufficient, and accomplished this by making the demand 'pursuant to' the mortgage equivalent to the notice required by s 114, but s 115 does not operate to vary the mode or service of notice prescribed by s 114 or to put it in the power of parties dealing with lands under the Act to contract themselves out of the Act and evade one of the principal requirements and safeguards, namely, that the registered proprietor of the land shall have notice of any proposed dealing with the land prejudicial to his title. In this case, if the mortgage conferred on the mortgagee the option of giving notice to the mortgagor without also giving notice to the transferee, the registered proprietor would if a sale had been effected on 5 February 1901 have been denuded of his title without his knowledge and without any opportunity of exercising his equity of redemption. That fact that the attempted sale proved abortive, and that notice of the mortgagee's intention to apply for a foreclosure order was sent as alleged to the transferee, does not cure the want of the 'default'... .

On a summons under s 209 of the Land Transfer Act 1890, calling upon the Registrar of Titles to show why an order of foreclosure should not be issued by him, Williams J referred the same to the Full Court which held that for the reasons stated in the course of the argument, the Commissioner was right, and that the summons should be dismissed. In the course of the argument, Holroyd J said, inter alia, this:

> The Act controls the instrument of mortgage. You cannot draw up a mortgage so as to control the Act. The strictest procedure is intended to be followed in regard to foreclosure.

There is also the decision of the Supreme Court of Canada in *Smith v National Trust* (1912) 45 Can SCR 618 applying the principle of construction which excludes the validity of any power of sale not authorized by the statutes and ensuring that 'the benefit of the Act' shall be 'dependent upon its requirements being satisfied', with the result that a power of sale omitting all mention of notice and periods of default and carried out without reference to any judicial directions is invalid for the purpose of enabling the purchaser from the mortgagee to be registered as owner.

A In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with B the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner. With respect, C we must therefore hold that the case of *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* [1986] 1 MLJ 75 — in so far as it decides to the contrary — was wrongly decided.

We hasten to add that we have not overlooked the cases of *Malaysia Credit Finance Bhd v Yap Hock Choon & Anor* [1989] 1 MLJ 232 (High D Court, Kuala Lumpur) and *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247 (High Court, Penang) which, according to Counsel for the Bank were authorities for the proposition that a chargor and chargee could by agreement enlarge the powers of a chargee under the Code and thus enable a chargee to sell the charged land without taking proceedings under the Code to obtain a judicial sale.

E In our view, neither *Malaysia Credit Finance*'s case nor *Chung Khiaw Bank*'s case is authority for the proposition for which they were cited. Moreover, with profound respect, both these cases have been subjected to some justifiable criticism (see Loh Siew Cheang and Aggie PL Chew, 'A legal impossibility: Arming chargees with private power of sale of charged F land outside the provisions of the National Land Code 1965' [1990] 1 MLJ xxxvi).

Counsel for the Bank also relied on s 206(3) of the Code, which provides:

> 206(3) Nothing in sub-s (1) shall affect the contractual operation of any G transaction relating to alienated land or any interest therein.

Subsection (1) provides:

> (1) Subject to the following provisions of this section —
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of ss 207 to 212; and H
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Pt Eighteen.

In our view, s 206(3) of the Code contains an express provision which I states that the provisions of the Code requiring a dealing to be effected in the statutorily prescribed manner shall not '... affect the contractual operation of any transaction relating to alienated land or any interest therein'. This provides statutory authority for the liberal application of

equity whenever there is a basis for that (see, eg *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105; *Mercantile Bank Ltd v Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196; *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 at p 459 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at p 405).

However, it is a condition precedent for the application of s 206(3) that there is in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract. When, therefore, as here, the relevant provisions of the Debenture relied upon by the Bank as conferring upon it a power to sell the lands are void for the reasons stated, the condition precedent for the application of s 206(3) is absent.

In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are *exhaustive and exclusive* and any attempt at contracting out of those rights — unless expressly provided for in the Code — would be void as being contrary to public policy.

We are supported in this by the following passages in Dass on *The Torrens System in Malaya* at pp 429–430:

> The specific provisions of the Code, where applicable, override the covenants between the parties. The method prescribed for sale is intended to be exclusive. The form of charge is purely statutory. It no doubt permits the insertion of special covenants and powers limiting or enlarging the rights of the parties but not so as to authorize the chargee to deal with the title in a manner which is repugnant to the express provisions of the Code.

We would, therefore, answer the first question of law posed above — ie, whether the Receivers and Managers were by virtue of the powers conferred upon them by the Debenture entitled to sell the charged lands without taking proceedings under the Code to obtain a judicial sale — in the negative; that is to say, in favour of the Borrower Company.

On a further ground also, the Borrower Company is entitled to succeed.

The second question of law: What is the impact of the winding up of the Borrower Company on the receivership, in particular, on the powers of sale of the Receivers and Managers?, had been argued before the learned judge and determined by him; and since it had also been raised before us, and indeed, fully argued, we think it would be desirable if we said something about it as well.

It was contended by Counsel for the Borrower Company by way of alternative that although the Receivers and Managers were agents of the Borrower Company at the time of their appointment, upon the Borrower Company being placed in liquidation on 27 February 1989, their agency and powers to carry on the Borrower Company's business ceased (*Gosling v Gaskell* [1897] AC 575 (HL)) and that consequently they had no authority to sell the charged lands.

It is undoubtedly the law in the United Kingdom that with the advent of liquidation, a receiver and manager's status as agent of the

company comes to an end and he then becomes a principal in his own right unless he looks to and receives instructions from the debenture holder regarding the conduct of the receivership (see *American Express International Banking Corp v Hurley* [1985] 3 All ER 564). To put it another way, winding up after a receiver and manager is appointed terminates his purely personal powers but not his in rem powers.

The distinction between a receiver's and manager's in rem powers and his personal powers is this: the former flow from the security created by the debenture and relate to the assets of the company whereas the latter relate to everything else. So, for example, in *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616, a receiver appointed over assets which included a mortgage debt could validly exercise the power of sale in the name of the company despite its liquidation. This power, being coupled with an interest, was irrevocable both at common law and by statute and accordingly, a power given to the receiver for the purpose of securing a benefit to the debenture holders was irrevocable as a power given to the debenture holders themselves. It was further held that the sale did not contravene s 227 of the Companies Act 1948 (equivalent to the Malaysian s 223) since although made in the name of the company, it was a sale of property which did *not* belong to the company but formed part of the debenture holder's security.

I note that the High Court at Johor Bahru in *United Malayan Banking Corp Bhd v Official Receiver* followed *Sowman* when it held that liquidation of the company had no consequence to the validity of the power of the receiver to sell the charged land and execute the transfer without the intervention of the court. In so holding, the court drew a sharp distinction between the termination of the receiver's agency of the company and the survival of the receiver's powers under the debenture which in its view transcended and existed independently of the liquidation (at p 81). The court also laid stress on the point that the power to sell under the debenture arose by virtue of the contractual provisions of the debenture itself and so it was necessary to distinguish between the power to sell and the mechanics of giving good title. The court also pointed out that had the debenture been deposited under s 4 of the Powers of Attorney Ordinance 1949, then s 6(1)(a) of the Ordinance would have rendered the liquidation of no consequence to the validity of the power of the receiver to make good title to the company's property in the company's name and thus the receiver could sell the land.

The question for decision regarding this part of the case is whether in Malaysia, s 223 of the Act prohibits the Receivers and Managers from making a valid disposition of the lands after the commencement of the winding up.

In the present appeal, the judge in the court below answered this question in favour of the Receivers and Managers, being of the view that the fact that a company has gone into liquidation neither affects a secured creditor nor the securities held by them; at least, not until the secured creditor has been fully paid off. The Receivers and Managers, the judge said, were entitled to do what the Debenture entitled them to do. The

principle underlying this conclusion was that notwithstanding the liquidation which terminates the receiver's agency for the company, the receiver continued in office, had control of all or substantially all of the assets of the company and may exercise security rights for the benefit of his debenture holder by, for example, selling and conveying the company's property (see *Sowman v David Samuel Trust Ltd*). This — so the argument ran — was merely carrying into effect a disposition made by the company when it created the charge before it went into liquidation; it was a sale of property which did *not* belong to the company but formed part of the debenture holder's security and therefore did not require approval of the Court under s 223 of the Act (see *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng* applying *Sowman v David Samuel Trust Ltd*).

A B C

However, as we have said, there is an essential difference between a Common Law mortgage and a statutory charge under the Code; and the point we should like to emphasize regarding this part of the case is that under the former, there is a transfer of ownership of the mortgaged land to the mortgagee *whereas* under the latter there is none, with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale. It follows that in the present case, with the advent of liquidation, any sale by the Receivers and Managers of the lands pursuant to the Debenture would be a purported sale *of property which belonged to the borrower company*, and so *would* require the approval of the court under s 223 of the Act. *Sowman*'s case is therefore distinguishable because there it was a sale of property which did *not* belong to the company but formed part of the debenture holder's security. This is a point which was overlooked both by the Judge in the court below and also by the court which decided *United Malayan Banking Corp Bhd v Official Receiver.*

D E

That, however, does not conclude the matter. F

In the United Kingdom, because a receiver has all or substantially all the assets of the company under his control by reason of the security created by the debenture and retains the power to manage and to realize those assets, a liquidator is obliged to stand on the sidelines in the course of the receivership. G

In *Sowman v David Samuel Trust Ltd*, the Land Office had refused to register conveyances of property executed by the receiver alone after the company had gone into liquidation. Gouldring J held that a power of attorney conferring upon receivers power to do various acts and in particular, to execute conveyances in the name of the company survived the winding up. His Lordship went further and indicated (at p 31) that the power of attorney ploy may be otiose because the receiver's general powers of realization also survive the winding up even though he loses his right to act as the company's agent in such a situation. In other words, his powers of realization exist independently of his authority to bind the company as its agent. H I

The position in this country is different. Because a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument is by definition (see s 4(1)(b) of the Act) an officer of the corporation — and all officers of a corporation,

whether past or present, are obliged under pain of prosecution under s 300(1) of the Act, to deliver up to the liquidator appointed by the Court or as he directs: (i) all the moveable and immovable property of the corporation in his custody or under his control; or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s 300(1)(b)(i) and (ii)) — the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, *since there is no estate for the receiver and manager to administer.* With respect, therefore, *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd* which relied on *Sowman* must be taken to have been wrongly decided on this point as well.

There is another matter regarding this part of the case to which we should like to direct attention.

The only persons who may be made respondents in misfeasance proceedings under s 305 of the Act are promoters, liquidators and officers. By s 4(1)(b), 'officer' is defined to include 'a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument' — that is to say, a privately-appointed receiver and manager; but does *not* include, inter alia: (i) any receiver who is not also a manager; and (ii) any receiver or manager appointed by the court or creditors. Orders may thus be made under s 305 against a privately-appointed receiver and manager.

This brings us to the case of *Re B Johnson & Co (Builders) Ltd* [1955] 1 Ch 634, wherein it was decided that receivers and managers appointed by debenture or loan security holders were *not* within the categories of persons who could be made respondents in misfeasance proceedings under s 333 of the UK Companies Act 1948. The reasoning of the Court of Appeal for this conclusion may be conveniently taken from the judgment of Parker LJ (at pp 663 and 664) where his Lordship said this:

> Turning to the wording of the section itself, if a receiver and manager is included, it can only be because he comes within the words 'any officer of the company' or the word 'manager'. So far as the expression 'officer' is concerned, this is defined by s 455 of the Act as including 'a director, manager or secretary'. No doubt a person who, in fact, manages is a 'manager' within that definition, provided, and provided always, that he does so by virtue of some office which he holds in the company. But any work of management done by a receiver, though done as agent, is not done by virtue of any office that he holds in the company; and this is so whether he is appointed by the court or out of court. Moreover, the contrary was but faintly argued. Indeed, the main argument raised by Mr Blackledge was based on an acceptance of the view that a receiver and manager is not within the definition of 'officer'. Granted that he is not (so runs the argument), yet 'manager' in s 333 itself must be used in a different and wider sense than where it appears in the definition, namely as meaning someone who manages in the widest sense, even though not an officer. Looked at in this way, the word is wide enough, so it is said, to embrace a receiver and manager.
>
> However plausible this argument may be at first sight, it must, I think, fail when the history of the section is considered. Thus, the wording of s 333

> is to be found in very similar form persisting in successive Acts since 1862; whereas the definition of 'officer' appears for the first time in the Act of 1948. Further, the argument for a distinction between the meaning of 'manager' in the section and in the definition goes when it is realized that 'director' also appears in both places. What, however, in my judgment, is decisive of the case is that any work of management done by a receiver is not done as manager of the company. The powers of management are ancillary to his position as receiver, and, in exercising those powers, he is not acting as manager of the company but as manager of the whole or part of the property of the company. This distinction is, as it were, underlined by the Act itself (see the group of sections in Pt VI of the Act, where the expression 'receiver or manager of the property of the company' is used throughout). In my judgment, it is clear that a person occupying the position of Mr Aizlewood in the present case is not a 'manager' or 'officer' within the section.

It is clear that the basis of the point decided in *Re B Johnson & Co* — namely, that privately-appointed receivers and managers are not within the reach of misfeasance proceedings — was because they were *not* within the categories of persons named in the relevant statutory provision, the material part of which is different from the corresponding provision in our Act.

In the result, we would allow the appeal with costs both here and in the court below, set aside the judgment of the court below and substitute, in lieu thereof, declaratory orders answering both the questions of law aforesaid in favour of the borrower company. The deposit paid into court must be refunded to the borrower company.

Appeal allowed.

Reported by Kenneth Goh